IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

1. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6776/2005

2. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6784/2005

3. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6785/2005

4. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6786/2005

5. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6787/2005

6. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6788/2005

7. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6789/2005

8. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.220/2006

9. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.6698/2005

10. Hindustan Zinc Ltd. Vs. UOI & Ors.
D.B. CIVIL WRIT PETITION NO.364/2007

Date of judgment : 23rd January, 2007

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE CHATRA RAM JAT

Mr. Rajendra Mehta)
Mr. Dinesh Mehta) for the petitioner.

Mr. V.K. Mathur)
Mr. B.M. Bohra) for the respondents.
Mr. I.S. Pareekh)
Mr. L.R. Choudhary)

BY THE COURT:- (PER HON'BLE RAJESH BALIA, J.)

In these petitions, the parties have joined the issue about the ambit and scope of Rule 57CC of the Central Excise Rules, 1944 about the availing of Modvat Credit on duties paid on inputs used at smelter by the petitioner-company vis-a-vis the part of sulphric acid produced by it in its sulphuric acid plant and sold to IFCO, a manufacturer of furtilizer, who is entitled to avail concession of acquiring sulphuric acid used by it as an input in manufacture of fertilizers on payment of duties in terms of the exemptions notifications issued from time to time.

For the present purposes, we may notice relevant provisions of statute, rules and notification relevant for our purposes. So far as the sulphuric acid is concerned as an end product it is chargeable to Duty under tariff head 28. The rate of duty provided under the Tariff Act is 16% ad velorum.

There is no exemption as such to the manufacture from the payment of duty on manufacture of sulphuric acid when removed.

Under general exemption No.66 issued under Sub-Section (1) of Section 5A of the Central Excise Act, 1944, by the Central Government the relevant provision reads as under:-

> "Exemption and effective rates of basic excise duty for specified goods of Chapters 9 to 96.-- In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 944 (1 of 1944), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below or specified in column (3) of the said Table read with the concerned List appended hereto, as the case may be, and falling within the Chapter, heading No. Or sub-heading No. Of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table,-

(a) from so much of the duty of excise specified thereon under the First Schedule (hereinafter referred to as the First Schedule) to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table; and

(b) from so much of the Special duty of excise leviable thereon under the Second Schedule (hereinafter referred to as the Second Schedule) to the Central Excise Tariff Act, as is in excess of the amount calculated at the rate specified in the corresponding entry in column (5) of the said Table,

subject to the relevant conditions specified in the annexure to this notification, and referred to in the corresponding entry in column (6) of the said Table:

Explanation.- For the purpose of this notification, the rates specified in columns (4) and (5) of the said Table are ad valorem rates, unless otherwise specified :-

Table

S. No.	Chapter or heading No. Or sub-heading no.	Description of goods	Rate under the first Schedule	Rate under Second Schedule	Condition No.
(1)	(2)	(3)	(4)	(5)	(6)
1	...	.....	....	....	....
2 to 35	...	.....	....	....	....
36	28	Sulphuric acid, oleum, oxygen and ammonia used in the manufacture of fertilizers	Nil	-	5
37 to 272	...	.....	....	....	....

The nil rate is applicable subject to condition No.5 mentioned in the annexure appended to the General Exemption No.66, which inter alia reads as under:-

"5. Where such use is elsewhere than in the factory of production the exemption shall be allowed if the

procedure laid down in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, is allowed."

The Rule 57 CC reads as under:-

> **Rule 57 CC. Adjustment of credit on inputs used in exempted final products or maintenance of separate inventory and accounts of inputs by the manufacturer,--** (1) Where a manufacturer is engaged in the manufacturer of any final product which is chargeable to duty as well as in any other final product which is exempt from the whole of the duty of excise leviable there on or is chargeable to nil rate of duty and the manufacturer takes credit of the specified duty on any inputs (other than inputs used as fuel) which is used or ordinarily used in or in relation to the manufacture of both the aforesaid categories of final products, whether directly or indirectly and whether contained in the said final products or not, the manufacturer shall, unless the provisions of sub-rule (9) are complied with, pay an amount equal to eight per cent of the price (excluding sales tax and other taxes, if any, payable on such goods) of

the second category of final products charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

(2) The amount mentioned in sub-rule (1) shall be paid by the manufacturer by adjustment in the credit account maintained under sub-Rule (7) of Rule 57G or in the accounts maintained under Rule 9 or sub-Rule 173G and if such adjustment is not possible for any reason, the amount shall be paid in cash by the manufacturer availing of credit under Rule 57A.

(3) The provisions of sub-rule (1) shall not apply to final products falling under Chapter 50 to 63 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).

(4) The provisions of sub-rule (1) shall also not apply to --

(a) Articles of plastics falling within Chapter 39;
(b) Tyres of a kind used on animal drawn vehicles or handcarts and their tubes, falling within Chapter 40;
(c) Black and White television sets, falling

within Chapter 85; and

(d) Newsprint, in rolls or sheets, falling within Chapter heading No.48.01; which are exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate duty.

(5) In the case of final products referred to in sub-rule (3) or sub-rule (4) and excluded from the provisions of sub-rule (1), the manufacturer shall pay an amount equivalent to the credit of duty attributable to inputs contained in such final products at the time of their clearance from the factory.

(6) The provisions of sub-rule (1) shall also not apply to final products which are exported under bond in terms of the provisions of Rule 13.

(7) The provisions of sub-rule (1) shall apply even if the inputs on which credit has been taken are not actually used or contained in any particular clearance of final products.

(8) If any goods are not sold by the manufacturer at the factory gate but are sold from a depot or from the premises of a consignment agent or from any other premises, the price (excluding sales tax and

other taxes, if any, payable) at which such goods are ordinarily sold by the manufacturer from such depot or from the premises of a consignment agent or from any other premises shall be deemed to be the price for the purpose of sub-Rule (1).

(9) In respect of inputs (other than inputs used as fuel) which are used in or in relation to the manufacture of any goods, which are exempt from the whole of the duty of excise leviable thereon or chargeable to nil rate of duty, the manufacturer shall maintain separate inventory and accounts of the receipt and use of inputs for the aforesaid purpose and shall not take credit of the specified duty paid on such inputs."

The factual matrix which is in short and about which there is no dispute is that the petitioner company as an smelter wherein non ferrous metal like refined zinc and lead are being manufactured and in the said process sulphuric di oxide gas is produced which is a bye product. Due to environment laws, the petitioner was prohibited from releasing the said gas. It has, therefore, set up a sulphuric acid plant in the said smelter. In the said plant sulphuric di

oxide is used for the product of sulphuric acid as an input. The sulphuric acid is manufactured in separate.

From the smelter where the sulphuric di oxide is produced as a bye product of the activity of the smelter plant is passed on to sulphuric acid plant and thereafter the sulphuric acid is produced by the chemical process in the acid plant. In other words, the sulphuric acid is not product of the same plant where the zinc and lead are being manufactured.

The question relates to availing of modvat credit in respect of Duties paid on the inputs used in smelter.

So far as the product of smelter is concerned, there is no dispute that the same are chargeable to duty and inputs used therein are eligible for availing modvat credit.

With reference to condition No.5 subject to which the sulphuric acid has been subjected to nil date of duty refers to Central Excise Removal of Goods at Concessional Rate of Duty for Manufacture of Excess Goods Rules, 2001. A perusal of the Rules of 2001 clearly indicates that these exemptions

are **available to a manufacturer, who intends to receive the special goods of the notification at a concessional rate of duty for use in his manufacturing activity, he can acquire such product on payment of concessional rate of duty for his own purposes.** In other words, the Rules of 2001 extends the benefit of exemption from the duty on goods when received in his factory which is otherwise subject to duty and not to the manufacturer of the product itself on removal. Rule 3 of the Rules of 2001 inter alia provides that a **manufacturer, who intends to receive subject goods for specified use at** concessional rate of duty, shall make an application in quadruplicate in the prescribed Form to the jurisdictional Assistant Commissioner of Central Excise or the Dy. Commissioner of Central Excise, as the case may be. The applicant shall execute a general bond for surety or security. The bond shall be for such amount as considered appropriate by the said Assistant Commissioner or Dy. Commissioner, to cover the recovery of duty liability estimated to be involved at any given point of time and the application of the manufacturer intending to receive goods on concessional rate of duty shall be counter signed by such authority certifying that the said manufacturer has executed a bond to his satisfaction in respect of the end use of the goods and

indicate the particulars of such bond.

Sub Rule (7) of the Rule 3 makes the things clear that a copy of the application referred to in sub-rule (6) received by the manufacturer, shall be forwarded by the said manufacturer of fertilizer to the manufacturer of subject goods (to be used as inputs). It also envisages under Rule 6 that where the subject goods are not used by the manufacturer for intended purpose, the manufacturer shall be liable to pay the amount equal to the difference between the duty leviable on such goods but for exemption and that already paid if any at the time of removal from the factory of the manufacturer of the subject goods along with the interest and the provisions of the Section 11A/11B the Central Excise Act, 1944 was applied for effecting such recoveries. In other words, the Rules of 2001 make it clear that exemption or concession is applicable to the recipient of the subject goods and not to the manufacturer of the subject goods.

In other words when X is the manufacturer of subject goods and Y is utilising the goods manufactured by X then Y is entitled to receive goods from X on payment of duty at concessional rate with a liability to make good the

concession availed by him in case he does not utilise the subject goods for the purpose of which concession is availed by him. There is no concession in envisaged for manufacturer X in respect of such goods manufactured by him.

In the backdrop of aforesaid provisions the Revenue contends that to the extent sulphuric acid is ultimately cleared by the petitioner to the manufacturer of fertilizers on payment of nil duty in terms of Exemption No.66, on receipt of application counter signed by the competent authority in terms of Rule 2001, the petitioner is engaged in manufacture of goods which are partly liable to excise duty and partly liable to nil rate of duty on removal from factory of the petitioner to the factory of fertilizers producer. Therefore, in terms of Rule 57 CC Sub-Rule (9) he is required to maintain a separate account of using of inputs used in relation to manufacture of sulphuric acid cleared to fertilizers manufacturers and inputs used in other products which are chargeable to duty and in case the petitioner has not maintained the registers in terms of sub-rule (9) of Rule 57CC, he is liable to pay 8% of duty on the removals of sulphuric acid in terms of Rule 57CC.

On the other hand, it is contended by the learned counsel for the petitioner that at the very outset the inputs were received and used in the smelter plant, where end product is non-ferrous metals viz. Zinc and lead and both are subject to payment of Duty. Use of such inputs is complete in smelter plant. The same cannot be considered to be inputs referable to the plant where sulphuric acid is being produced inasmuch as once the production at the smelter plant is complete and the bye product of it namely sulpher di oxide gas is transmitted to another plant consumption of inputs at the smelter plant, which is engaged in manufacture of production of goods is complete. The inputs used in smelter are not and cannot be divided between their user in the smelter plant the sulphuric acid plant separately or proportionately. Therefore, Rule 57 CC in its very scheme, is not applicable to the petitioner as manufacture of zinc and lead at its smelter plant in respect of inputs used and consumed in smelter plant itself.

It has further been contended, assuming it that the petitioner is engaged in manufacture of zinc on the one hand

and also sulphuric acid on the other hand. Both the products are excisable and are not exempted wholly from the payment of excise duty nor chargeable to nil rate of duty, when manufactured. The General Exemption No.66 about sulphuric acid is not referable to the petitioner- manufacturer, who is manufacturer of the subject goods but is applicable to the recipient of the subject goods on fulfillment of certain conditions, if he wants to utilise the same in manufacture of fertilizer. Therefore, exemption or concession under Exemption No.66 is not available to the petitioner as a manufacturer of the sulphuric acid but is available to the buyer of the sulphuric acid, who is engaged in manufacturing the fertilizers. The petitioner as a manufacturer of sulphuric acid is not engaged in production of goods which are exempt from payment of duty wholly or is liable to duty at nil rate. In this connection, the learned counsel has buttressed his arguments on principle that the modvat credit is availed by the petitioner manufacturer at the time when he receives the inputs in his factory. The condition to be fulfilled for availing the modvat credit, which governs his case, is to be on the date on which the inputs are received by the manufacturer and not at the time when the goods leaves the factory. Once on the

date of receipt, if on existing material, the manufacturer is entitled to avail the same on the very same day, his right to avail modvat credit on such date is not effected by happening of contingency in future, on which results in applicability of nil rate of Duty. Therefore, he contends that as on the date the petitioner had received inputs, he was engaged in the manufacture of zinc lead and sulphuric acid. This is without prejudice to first contention. As on the date when all the three types the goods were chargeable to duty and no exemption was available to the manufacturer as such on the commodity manufactured by him nor the duty was chargeable at that time at the nil rate. The chargeability to Duty also remain unaffected when goods are manufactured and sold or removed from factory in ordinary course. It is only in case sulphuric acid is sold to a manufacturer of fertilizer and the goods are received by such manufacturer on submission of his application counter signed by authorized officer in terms of Rules of 2001. In short become entitled to avail modvat credit, at given point of time attached with no illegality and invalidity, at the relevant time, no exemption as envisaged was attached to availability of modvat credit when inputs were received by the petitioner manufacturer in its smelter plant, it

became absolute entitlement, which could not be defeated on same concession made available to particular receipts of such end product, under certain conditions. The concern itself being conditional and defeasible, it could not defeat the indefeasible right to avail modvat credit in the first instance. Being a contingent concerned available to acquirer of such product could not affect right of petitioner manufacturer to avail modvat credit when the inputs were received by it at its factory, it cannot be recalled on subsequent turn of events. He further adds that even if subsequent to the date of receipt of inputs in his factory on which the manufacturer using inputs becomes entitled to avail modvat credit, the product made by him is exempted from payment of duty, it cannot effect the modvat credit availed by him prior to such exemption is notified.

These are the basic contentions that are raised before us.

Credit of duty paid on excisable goods when used as inputs in production of some other goods, known as modvat credit was first introduced in 1992. Rule 57A has

undergone amendments from time to time and the modvat scheme has been later on substituted by the Cenvet scheme. But the basic principle remains that the Central Government may by notification in the official gazette specify final products (finished excisable goods) for the purpose of allowing credit of any duty of excise or additional duty under Section 3 of the Customs Tariff Act 1975 paid on the goods used in or in relation to the manufacturer of the said final product, referred to as the inputs and the manufacturer availing such credit is permitted to utilise such credits towards the payment of duty of excise leviable on the final product, whether under the Central Excise Act or under any other Act as may be specified in said notification. In other words, in respect of the inputs used in the production of the final products by a manufacturer which has been specified in notification issued under Rule 57A, the manufacturer is entitled to avail credit of duties paid on inputs in terms of the scheme laid down in Rules that followed the Rule 57A. Rule 57B is not relevant for the present purpose.

Rule 57 C prohibited the availing of credit of specified duty, on such quantity of inputs which are used in

the manufacture of final products which are exempted from the whole of the duty of excisable or chargeable on Nil rate of duty. Sub-Rule (2) of Rule 57 C inter alia provided that where a manufacturer avails the credit of specified duty on any inputs and he is engaged in manufacture of any final product which is chargeable to duty as well as in the manufacture of any other final product which is exempt from the whole of duty of the excise levied thereon or is chargeable to the nil rate of duty, in the same factory, the provisions of sub-rule (1) shall be deemed to be satisfied only when the provisions of sub-rule (1) or sub-rule (5) or sub-rule (9) of Rule 57 CC are complied with, or where goods are exported under bond in terms of the provisions of Rule 13. Rule 57 C does not apply to the inputs used as fuel.

It may be noticed that Rule 57 C was applicable to end product exempted from the payment of duty or chargeable to Nil rate of duty only in case where such product is manufactured in the same factory.

Rule 57 CC was introduced in 1996 vide notification dated 23rd July, 1996 for the first time. The Rule

57 CC was not inhibited by the condition of final product chargeable to the duty as well as not chargeable to the duty to be manufacture in the same factory, but was made applicable to all cases where the manufacturer has taken credit of the specified duty on any inputs other than the inputs used as fuel which is ordinarily used in relation to manufacture of final product, whether directly or indirectly and whether contained in the said final product or not.

As is evident from the provisions noticed above that in respect of a manufacturer, who is engaged in the manufacturing of final product which is chargeable to duty as well as in other final product which is exempted from the whole of the duty of excise leviable thereon or is chargeable to the Nil rate, is under an obligation in terms of Rule 9 to maintain a separate inventory and accounts of the receipt and use of inputs for the purpose in relation to the manufacture of any goods which are exempted from the whole of the duty of excise leviable thereon or chargeable at nil rate of duty.

Significantly this provision postulates making of separate inventory and maintaining separate accounts at the

time of receipts of inputs in the factory. Its significance lies in revealing that to attract above obligation, the chargeability of any end product manufactured by the manufacturer to the duty or its exemption from the whole of Duty or chargeability to Nil rate must be discernible at the time of receipt of inputs in the factory. When the entitlement to availing modvat or cenvat credit is to be determined, the period of such determination is not referable to a future date, when the end product leaves the factory. If at the time of receipt of the inputs in the factory, the goods manufactured by the manufacturer in question predictably cannot be said to be chargeable to the duty or exempted from duty or liable to charge at nil rate, the very maintenance of separate inventory would not apply and account for different products will not be possible nor such provision can be attracted depending on end course that may actually take place. In other words, the chargeability to duty on the final product being exempted from whole of the duty or excise leviable thereon or chargeable at the nil rate of duty have nexus with the date on which the manufacturer is entitled to avail credit of duties paid on such inputs used by him in the manufacture of his product. Such date is date of receipt of inputs in the factory.

Rule 57 G lays down the procedure for availing the modvat credit. It provides that a manufacturer, who intends to take credit of the duty paid on inputs under Rule 57 A or 57 B shall file a declaration with the Assistant Commissioner of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in the said final products and such other information as the said Assistant Commissioner may require, and obtain a dated acknowledgment of the said declaration. Sub-Rule (2) of Rule 57G reads as under:-

> "(2) A manufacturer who has filed a declaration under sub-rule (1) may, after obtaining the acknowledgment aforesaid, take credit of the duty on the inputs received by him."

Sub-Rule (3) further envisages that no credit under sub-rule (2), shall be taken by the manufacturer unless the inputs are received in the factory under the cover of documents specified thereunder.

Sub-Rule (6) ordains that the manufacturer may take credit on inputs received in his factory. Sub-Rule (8) requires the manufacturer of final product to submit monthly return indicating the particulars of the inputs received during the month and the amount of credit taken. Thus in term of Rule 57 G, the manufacturer becomes entitled to avail modvat credit with respect of inputs received in his factory under prescribed documents after he has obtained the acknowledgment of declaration soon after the dated acknowledgment of declaration is received by him. It is not postponed until its actual utilisation at all.

In this connection reference to Rule 57 F would also not be out of place as it reveals one important aspect of availing modvat credit. It envisages that the inputs on which credit has been taken may be used in or in relation to the manufacture of final product, but where the inputs are removed for home consumption, the manufacturer at the time when the inputs are received in factory to be used in the manufacture of the final product and it is only on the non-user of such inputs in the month of final product and the use of inputs for other purposes, all the persons who have

received the inputs in their factories and availed the credit of duties paid thereon are liable to refund the same. Else the right to avail modvat credit vests in the manufacturer on the receipt of inputs in the factory, but also envisages that the manufacturer is entitled only to modvat credit in respect of inputs actually used by him in the manufacture of final product and only to the extent it is paid on such inputs which is clear from the Rule 57 E which requires that if the manufacturer of the inputs receives any refund of the duty paid by him then the manufacturer, who receives such goods as inputs and avails modvat credit has also to make adjustment of such refund of modvat credit so that they cannot avail more credit than what has been actually paid by the producer or manufacturer of such inputs and only in respect of inputs actually used in the manufacture of his end product.

In this background of the modvat credit scheme in respect of duty paid on inputs at the time of receipt thereof by the manufacturer of final product on receipt of the dated of acknowledgment of his declaration, the reasonable inference is that whether the end product in or in relation to which

inputs are used is exempted from the whole of the duty or is liable to Nil rate of duty, is to be considered in the light of prevailing provisions on the date of receipt of the inputs in the factory and not with reference to any other date.

It appears that the combined effect of Sub-Rule (9), sub-Rule (1) of Rule 57 CC and the substantive scheme of availing modvat credit in respect of inputs, the decisive date for the assessee's entitlement to modvat credit is not postponed to the date of clearance. The operation of Rule 57 CC is also to be seen as on the date the manufacturer becomes entitled to avail modvat credit. It is with reference to said date his obligation to maintain separate inventory about the use of inputs by him can be operated so as to dis-entitle the manufacturer from availing modvat credit at all in respect of final product/goods manufactured by him which is exempt from whole Duty or is chargeable to nil rate of duty or is not chargeable to duty at all. Rule 57 CC does not speak of adjustment of any duty which is not ultimately paid on the final product on clearance due to certain contingency arising in future. In other words, the availing of modvat credit is not postponed. When Rule 57 CC operates at the time when the

assessee claims his entitlement to modvat credit and state of affairs existing at that time can alone be seen to find out whether the end product of the assessee which is more than one are chargeable to duty or are exempted from the whole of the duty or are chargeable to nil rate of duty.

In this connection, it will be apposite to refer to the Supreme Court decision in Collector of Central Excise, Pune and Ors. Vs. Dai Ichi Karkaria Ltd. & Ors. (1999) 7 SCC 448.

The question has arisen in the light of issue arising from the provisions relating computation and determination of value of excisable articles which in that case was a intermediate product. The manufacturer has received raw material which was to be used as input for his final product. The raw material had suffered duty at the end of the sale. The question had arisen whether the duty paid by the seller could be considered as part of cost of acquiring the inputs for the purpose of valuing the intermediate product to work out duty payable on such intermediately product so that the modvat credit availed on the inputs can be utilised against the same. In other words, the extent of modvat credit availed on the

duties paid on raw material could be utilised in respect of duties payable on the intermediate product was the issue before the Court and the extent was to be determined on the determination of the cost of intermediary product. Examining the scheme of the modvat credit under Rules 57A to G, the Supreme Court laid down the ratio :-

> "It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product **immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product.** There is no provision in the Rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it sands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore,

> indefeasible. It should also be noted that there is no correlation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that is becomes available."

The aforesaid decision fortifies us in our conclusion and makes it clear beyond doubt that a manufacturer obtains credit of the excise duty paid on inputs to be used by him in production of excisable product on receipt of such inputs by him and once it becomes entitled to avail the modvat credit, and avails, it cannot be defeated unless otherwise provided by law.

As on the date the inputs in question were received by the manufacturer and is commodity in the manufacture of which he was engaged to use, the provision of Rule 57 CC were the zinc and lead and sulphuric acid and other commodities. Presently we are not concerned with as on the date the inputs received the sulphuric acid the final product

with which we are concerned was chargeable to duty at the rate of 15%. The manufacturer had not been exempted from payment of duty on his end product nor the duty prescribed in the sulphuric acid under the tariff was nil nor there was unconditional exemption to the manufacturer on payment of duty at Nil rate on any condition to be fulfilled by him. We have already noticed above that General Exemption No.66 which prescribed nil rate of sulphuric acid used in manufacture of fertilizers. It did not provide nil rate of duty on production or manufacture of Sulphuric Acid as such. Therefore, the end product sulphuric acid was not subjected to exemption. If Rule 57 CC is read closely, the exemption or nil rate must be related to the end product of the manufacturer. It does not speak of the nil rate or exemption from payment of duty on user of the commodity produced by the subsequent manufacturer using the same as his raw material or inputs. Obviously where the nil rate of duty is on the user of the commodity by the third person or used in manufacture of the another commodity, it is not the exemption or rate which exists as on the date any inputs are received by the manufacturer of sulphuric acid, nor it is amenable to such exemption or duty at nil rate when the

manufacturer of sulphuric acid takes place. The manufacturer becomes eligible to avail modvat credit on receipt of inputs in his factory for manufacture of goods which are not exempted from excise duty or which are exempted from excise duty or which are subject to nil rate of Duty. He cannot say that he is exempted from the payment of duty on his end product or that his end product is liable to nil rate of duty even at the time when sulphuric acid is manufactured. However, on clearance of end product at nil rate is due to the contingency arising as per specified condition coming into existence as per any exemption notification for the benefit of its end use by the buyer which was not in the hand of manufacturer. Like Rule 57E and 57F the provisions would have been differently worded to withdraw the modvat credit already availed at the time when it became due as per condition of Rule.

Apparently the existence of condition of exemption of end product from duty or its liability to nil rate of duty must also exist on the date inputs became available for availing modvat credit.

It can be seen from yet another angle. In case

inputs are received in factory and used in manufacture of end product. But the end product is destroyed by fire before stage of its removal from factory premise. In such circumstances, no excise duty becomes payable on end product. Yet modvat credit availed on inputs used in destroyed goods is not to be recalled. This is also suggestive of the fact the relevant date for considering exemption from duty of the end product in or in relation to which inputs are used is the date of its receipt in factory and condition is its actual use in or in relation to manufacture of end product by the manufacturer. The chargeability to duty or non-chargebility due to exemption or notified nil rate is to be considered at the stage before goods are actually produced, but on receipt of inputs intended to be used in manufacture of such goods. That being so ultimate clearance of goods at nil rate due to contingency existing at the time of removal does not affect the entitlement that legally arises long before that date.

We are unable to read from General Exemption No.66 that product of sulphuric acid by the manufacturer of sulphuric acid was exempted from the payment of whole of the duty or was subjected to nil rate of duty or vide under

Tariff Act or under the Exemption. It was only on the clearance of the sulphuric acid for specific use to the manufacturer of the fertilizer the latter was entitled to receive the sulphuric acid at nil payment of duty on furnishing counter signed application and on furnishing surety/ security to make the payment of Duty payable on sulphuric acid, if not utilised in manufacture of fertilizer. Therefore, it also cannot be said that the exemption or nil rate extended to the manufacturer of subject goods, which could at all be in contemplation of the manufacturer at the time of receipt of inputs when he became entitled to avail the modvat credit and availed modvat credit in respect of Duties paid thereon.

In view thereof, we have no hesitation to come to the conclusion that the Rule 57CC has no application to the petitioners-manufacturers of sulphuric acid as their product as such was neither exempted from payment of duty nor chargeable at nil rate of duty.

In this connection, it will be relevant to consider that what is envisaged under Rule 57 CC is chargeability of the production to duty and not to the duty chargeable on

clearance, which is the ground on which respondent Revenue intends to recall the modvat credit availed by the petitioners manufacturers on inputs used by them at their smelter.

In this connection, reference may also be made to a Bench decision of Kerala High Court in Collector of C.Ex. & Cus., Cochin Vs. Premier Tyres Ltd. 2001 (130) E.L.T. 417 (ker.) relying on the Supreme Court decision in Collector of Central Excise, Pune and Others V. Dai-Ichi Kakaria Ltd. and Other – 1999 (112) E.L.T. 353 (SC) considering Rule 57 C which is like provision where the product is not chargeable to duty on account of exemption from whole of the duty or chargeable at nil rate was under consideration. The Division Bench said that :-

> "Rule 57C of the Central Excise Rules states that no credit of the specified duty paid on the inputs used in the manufacture of a final product shall be allowed if the final product is exempt from the whole of the duty of excise leviable thereon or is chargeable to nil rate of duty. The respondent is making tyres and according to the Department, these are liable for excise duty. But certain types of tyres have been exempted from excise duty by a notification. But at the time when the credit was given regarding the inputs, it was not known that these products were exempted from duty. Under Rule 57G(1) of the Central Excise Rules, every manufacturer intending to

> take credit of the duty paid on inputs shall file a declaration with the Assistant Commissioner of Central Excise having jurisdiction over his factory, indicating the description of the final products manufactured in his factory and the inputs intended to be used in the said final product sand such other information as the said Assistant Commissioner may require, and obtain a dated acknowledgement of the said declaration. Thus, Rule 57C of the Central Excise Rules mandates that no credit of duty paid on the inputs used in the manufacture of final product shall be given if the final product is fully exempt from duty or is chargeable to nil rate of duty. Utilisation of the credit comes after allowing a credit of duty paid on the inputs. If any credit is wrongly taken and then utilised there are provisions in the Modvat scheme under Rule 57-I by which limitation of period has been provided for recovery of the wrong credit initially taken or utilised. According to us, utilisation of the credit is different from taking the Modvat credit if at the time of taking the Modvat credit, products are not exempted. Thus, according to us, it is not necessary to reverse the entry immediately. It is enough if it is utilised later. Further in this case, we were told that exemption notification was subsequently issued. The exemption notification was not there at the time when the credit was taken."

No other provision has been pointed out under which the modvat credit to which the petitioners become entitled to avail on the date of receipt of inputs can be withdrawn and cannot be availed for payment of excise duty

on the final product as and when the duty becomes payable thereon.

Upshot of this discussion in that prohibition against claiming modvat credit on exempted goods or subject to nil rate of duty applies in case where such exemption from payment of Duty or nil rate of Duty on end product is predictably known at the time the recipient of inputs is entitled to take credit of duties paid on such inputs. The fact that due to subsequent notification or on contingency that may arise in future, the end product is cleared without payment of duty due to exemption or nil rate of duty does not affect the availing of modvat credit on the date of entitlement. If on the date of entitlement, there is no illegality or invalidity in taking credit of such modvat/ cenvat credit, the right to utilise such credit against future liability towards duty become indefeasible and is not liable to be reversed in the contingency discussed above.

Accordingly, the petitions are allowed. The impugned notices are quashed.

No order as to costs.

[CHATRA RAM JAT], J. [RAJESH BALIA], J.

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